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No. 16

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

16

BANCO NACIONAL DE CUBA, *Petitioner*

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE CUBAN-AMERICAN SUGAR COMPANY AND THE CUBAN AMERICAN SUGAR MILLS COMPANY FOR LEAVE TO FILE BRIEF IN OPPOSITION AS AMICI CURIAE, AND BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, *Petitioner*

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE CUBAN-AMERICAN SUGAR COMPANY AND THE CUBAN AMERICAN SUGAR MILLS COMPANY FOR LEAVE TO FILE BRIEF IN OPPOSITION AS AMICI CURIAE

The Cuban-American Sugar Company and The Cuban American Sugar Mills Company respectfully move this Court for leave to file as *amici curiae* the attached brief in opposition to the petition for certiorari, and in support of the motion state as follows:

1. The Cuban-American Sugar Company is a New Jersey corporation, over 92% of the stock of which

is owned by American citizens, which has for many years owned and operated extensive sugar-producing properties in the Republic of Cuba through its wholly-owned subsidiaries, including The Cuban American Sugar Mills Company, a company incorporated in Cuba.

2. In August, 1960, the Castro Government of Cuba confiscated all of the Cuban properties of The Cuban-American Sugar Company and its subsidiaries in Cuba, including specifically the sugar-producing properties and sugar of The Cuban American Sugar Mills Company. Seizure of these properties occurred pursuant to Cuban Law No. 851 of July 6, 1960, the same law as that involved in the case at bar and to which the District Court and the Court of Appeals refused enforcement.

3. The Court of Appeals granted leave to The Cuban-American Sugar Company and The Cuban American Sugar Mills Company to file a brief in this case as *amici curiae* and also granted leave to counsel for the *amici curiae* to present oral argument at the hearing before the Court of Appeals. Counsel for the *amici* did file a brief and present oral argument.

4. The correspondence with the Department of State to which the opinion of the Court of Appeals adverts, and to which petitioner Baneo de Nacional de Cuba raises an objection in its petition for a writ of certiorari, was addressed to counsel for The Cuban-American Sugar Company and The Cuban American Sugar Mills Company, the *amici* below.

5. Consent of all respondents to the filing by The Cuban-American Sugar Company and The Cuban American Sugar Mills Company of a Brief in Opposi-

tion as *amici curiae* has been obtained. Consent of petitioner to such filing has been sought, but has been neither granted nor denied because counsel for petitioner has been out of the country and hence unavailable. Petitioner did oppose the participation of the *amici curiae* in the court below.

Respectfully submitted,

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Of Counsel:
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October 4, 1962

IN THE

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OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, *Petitioner*

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CUBAN-AMERICAN SUGAR COMPANY AND THE CUBAN AMERICAN SUGAR MILLS COMPANY, AS AMICI CURIAE IN OPPOSITION

QUESTIONS PRESENTED

1. In a case where the plaintiff, an agency of the Cuban Government, relied in support of its cause of action on a confiscatory Cuban nationalization decree, did the courts below err in refusing to lend themselves to automatic enforcement of the decree, without first considering its validity under international law, when

the State Department had taken the position that the effect to be given to the decree was for the courts to decide?

2. Did the courts below err in holding that a Cuban taking of the property of an American-owned corporation violated international law when the taking was made without provision for adequate compensation, when its purpose was to retaliate against the United States and when it discriminated against United States nationals?

3. Did the fact that the views of the State Department were brought to the attention of the Court of Appeals in part by way of correspondence deprive petitioner of due process of law?

STATEMENT

Petitioner, Banco Nacional de Cuba, is an agency of the Cuban Government. Respondent Sabbatino is the Temporary Receiver of the New York assets of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter "C.A.V."). C.A.V. was incorporated in Cuba, but approximately 90% of its shares are owned by residents of the United States. In this action petitioner sought to obtain the proceeds of sugar owned by C.A.V., seized in Cuba by the Government of Cuba in a manner found by a unanimous Court of Appeals to be manifestly in violation of international law, and purportedly sold to purchasers outside that country. These proceeds are now in New York in the hands of the Temporary Receiver of C.A.V. The issue below was whether the courts of the United States should order the representative of C.A.V. to pay these proceeds over to the Cuban Government.

1. Statement of Facts

Following a period of rapidly deteriorating relations between the United States and Cuba and of increasing affiliation of the Castro Government with the Communist bloc, Congress, on July 6, 1960, amended the Sugar Act of 1948, 61 Stat. 922, 7 U.S.C.A. § 1100 et seq., to authorize the President to reduce the sugar quota allotted to Cuba. 74 Stat. 330 (1960), 7 U.S.C.A. § 1158.

The reaction of the Cuban Government was immediate and violent. On July 6, 1960, it promulgated Law No. 851 which authorized the expropriation of American property in Cuba. The preamble of that law stated that its purpose was to defend against American "aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act . . . ." (J.A. 112a.) The only compensation authorized was 30-year Cuban Government bonds, the interest and principal of which were to be payable only out of a fund which plainly would never come into existence.[1] Recourse to the Cuban courts to seek redress for the seizure of property was expressly denied. (J.A. 115a.)

The Executive Branch protested the enactment of this law in a formal note from the State Department to

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[1] The fund was to consist of 25% of the foreign exchange received by Cuba each year from sugar sales to the United States in excess of 3 million Spanish tons at a price of not less than 5.75 cents per pound. (J.A. 114a-115a.) As the District Court pointed out, "from 1950 through 1959, the monthly average price for raw sugar shipments to this country received by Cuba at no time exceeded 5.50 cents per English pound . . . In only one year from 1950 through 1959 did Cuba sell sugar to this country in an amount exceeding 3 million Spanish tons." The bonds, the court pointed out, were "unmarketable and valueless." 193 F. Supp. at 386.

the Castro Government on July 16, 1960. The note stated:

> "The Nationalization Law is discriminatory in that it is specifically limited in its application to the seizure of property owned by nationals of the United States.
>
> "It is arbitrary because it was admittedly enacted in retaliation for recent actions taken by the Congress and President of the United States . . . .
>
> ". . . [It] is both arbitrary and confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation and in its specific prohibition of any form of judicial or administrative appeal from the resolutions of the expropriating authorities."

Law No. 851 was, the State Department concluded,

> ". . . manifestly in violation of those principles of international law which have long been accepted by the free countries of the West." 43 Dep't State Bull. 171 (1960). (J.A. 63a-64a.)

Notwithstanding this diplomatic protest, Cuba, on August 6, 1960, issued Executive Power Resolution No. 1 under Law No. 851. The Resolution ordered the confiscation of all the property in Cuba

> ". . . owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below . . . ." (J.A. 119a.)

Twenty-six corporations, including C.A.V., were listed. (J.A. 120a.)

On August 8 and again on August 13, 1960, the State Department again protested that Law No. 851 and the seizures under it were in violation of international law.[2] On January 3, 1961, the United States broke off diplomatic relations with Cuba. White House Press Release, January 3, 1961. 44 Dep't State Bull. 103 (1961).

Among the properties of C.A.V. seized by Cuba on August 6, 1960, was a cargo of sugar loading that day aboard a vessel off the Cuban shore. C.A.V. had entered into a purchase agreement with Farr, Whitlock & Co., an American broker, with respect to this sugar. (J.A. 41a.) Cuba would not, however, allow the vessel to sail until Farr, Whitlock signed a contract by which it purported to purchase the sugar from an agency of the Cuban Government. Farr, Whitlock signed this contract on August 11, and the ship was permitted to sail. (J.A. 47a.)

Farr, Whitlock subsequently received the proceeds of its sale of this sugar in the amount of $175,250.69. On August 16, 1960, shortly after the confiscation of C.A.V.'s assets in Cuba, the Supreme Court of New York, under N.Y. Civ. Prac. Act § 977-b, appointed respondent Sabbatino as Temporary Receiver of the assets of C.A.V. in New York. On October 24, 1960, that court ordered Farr, Whitlock to transfer the proceeds of the sugar, less its broker's commission, to the Temporary Receiver pending further order of the court. 208 N.Y.S.2d 833 (1960). (J.A. 56a-58a.)

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[2] The note of August 8 is printed at 43 Dep't State Bull. 316 (1960). (J.A. 65a.) That of August 13 is not printed.

2. Proceedings Below

Banco Nacional on October 10, 1960, brought an action in conversion against Farr, Whitlock and Sabbatino seeking to recover the proceeds of the sugar. The District Court granted summary judgment for defendants and dismissed the complaint. 193 F. Supp. 375. The court held that the Cuban decree authorizing confiscation of the sugar violated international law for each of the three independent reasons set forth in the notes of protest of the State Department: (1) it was retaliatory and not related to a valid public purpose; (2) it was discriminatory and was directed only against United States nationals; and (3) it was confiscatory, the only "compensation" authorized being "unmarketable and valueless" Cuban bonds. The court refused to give positive effect to the Cuban decree:

> "Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it. It follows that C.A.V. owned the sugar which was sold in the present case." 193 F. Supp. at 386.

On petitioner's appeal, the decision of the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit. (Petitioner's App. 28.)

Petitioner argued to the Court of Appeals that even if the decree upon which it, an agency of the very Government that had issued the decree, relied was in plain violation of international law, the courts of the United States were required to disregard this and had no choice but to lend their processes to aid Cuba in securing from United States nationals the fruits of the violation. This result, so contrary to usual legal standards, was said to be required by the so-called "act of state" doctrine.

After a review of the pertinent authorities the court found, contrary to petitioner's contentions, that no rule of law requires the courts to abstain from inquiring into the legality under international law of acts of a foreign state, and to give automatic positive effect to such acts, even when the Executive Branch of our Government has taken the position that the effect to be given in this country to such acts is for the courts to decide. The court discussed materials indicating that the Executive Branch in fact did not consider enforcement in this case of Cuban decrees invalid under international law, at the behest of the Government of Cuba, to be necessary to the implementation of United States foreign policy. These materials included statements by State Department officials, directed to this litigation, that "whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine." The court held that "when, as here, the State Department is willing for the court to adjudicate the rights of the parties, one of the basic reasons for the act of state doctrine—the danger that independent judicial decisions might interfere with this country's foreign relations—is inapplicable to support abstention." (Petitioner's App. 49.) It thereupon considered and rejected each of the other reasons offered by petitioner in support of its contention that the court must aid petitioner in its efforts to recover the proceeds of property even though that property had been seized by petitioner's principal in violation of international law.

With this preliminary matter settled, the Court of Appeals proceeded to an evaluation of the validity of the Cuban seizure under international law, stating that:

> ". . . we narrow the question for decision to the following: Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from *a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only.*" (Emphasis in original). (Petitioner's App. 60.)

After discussion of the facts and of the relevant authorities, the court held that the Cuban decree violated international law and that it therefore did not support the claim asserted by petitioner.

REASONS FOR DENYING THE WRIT

The decision below turns largely on the particular facts of this case. To the extent that it states and relies upon general principles of law, the statement and application of those principles are plainly correct and present no conflict with any decision of any other Court of Appeals or of this Court. Petitioner's contentions have been given the most painstaking consideration by four able judges below, who have unanimously found them to be without merit. There is no occasion for further review.

I.

The question whether the particular seizure here involved was retaliatory, discriminatory and confiscatory is one that necessarily depends upon the particular surrounding facts and circumstances. The opinions of the District Court and Court of Appeals marshal these facts and circumstances at length and conclude on the basis of them (1) that the seizure here involved was

one made from a particular case of aliens, (2) that it was made for the purpose of retaliation against the homeland of those aliens, (3) that it resulted in discrimination against them, and (4) that no meaningful compensation was made or provided for.

Each of these determinations is amply supported and documented in the opinions below. In any event, the question whether they are correct is one of fact and plainly not appropriate for review by this Court.

Nor is there any reason why this Court should review the legal conclusion that a seizure of property that is retaliatory, discriminatory and confiscatory to the extent of the seizure here involved constitutes a violation of international law. As is clear from the authorities cited and discussed in its opinion, the Court of Appeals would have been amply warranted in holding—just as the State Department was amply warranted in concluding—that the decree was in violation of international law for at least three different reasons. The court, however, found it unnecessary to go even this far, and merely held that when such a decree is retaliatory *and* discriminatory *and* confiscatory the sum of these elements renders it violative of international law. Petitioner points to no decision by any court of this country which conflicts with this determination, or which even casts the slightest doubt on its correctness.

Petitioner's argument that no violation of international law could have been involved in the Cuban seizure of the properties of C.A.V. because C.A.V. was chartered under the laws of Cuba is contrary to all authority. As the Court of Appeals pointed out, international law ordinarily disregards the "nationality" of a corporation when it is different from that of the majority of the stockholders. (Petitioner's App. 54.)

To have applied any other rule in this case would have been altogether anomalous, since the very reason for the taking by Cuba of C.A.V.'s property was, in the words of the decree, that it was an enterprise "in which nationals of * * * [United States] have a predominating interest." Under these circumstances the courts below were clearly correct in refusing to sacrifice substance to form by permitting the fact that C.A.V. was incorporated in Cuba to be interposed as a justification for the seizure.[8]

II.

It is, of course, settled that:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700.

Petitioner argues that nevertheless the courts below erred in even considering the question whether the confiscatory decree involved in this case violates international law. Its position is essentially based on the proposition "that judicial consideration of issues such as those found in this case constitutes interference with the power of the Executive to conduct foreign relations." (Petition 10.)

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[8] The Pedro, 175 U.S. 354, relied on by petitioner, is not in point for at least two reasons: (1) the seizure there involved, unlike that at issue here, was in no way motivated by the nationality of the owners of the enterprise, (2) the case arose out of an actual state of war and involved the particular principles of prize law applicable to that condition.

At the outset, it may be noted that it seems quite extraordinary to find an instrumentality of the Government of Cuba urging the courts of the United States to implement acts of that Government, directed against United States nationals and protested by the State Department as violating international law, on the ground that to do otherwise would embarrass the Executive Branch of the United States in the conduct of its foreign policy. In none of the cases cited by petitioner was the act of state doctrine invoked in an American court by the wrongdoing Government itself, as plaintiff, to seek to avoid judicial appraisal of the validity of acts upon which its claim depended. Apart from the other controlling considerations adduced below, this would appear in itself sufficient to demonstrate that there is not in fact any such conflict as petitioner claims between the decision below and any prior case in this or any other American court.

In any event, the broad question which petitioner would tender to this Court—whether the Judicial Branch of our Government should undertake to examine the validity of the acts of foreign governments when to do so might embarrass the Executive in the conduct of foreign relations—is simply not here presented. The court below found that "those responsible for the conduct of our foreign affairs" have indicated a willingness "that the courts here should decide the status here of Cuban decrees" and "for the court to adjudicate the rights of the parties." The pertinent authorities hold that under these circumstances the basic justification for the application of the act of state doctrine disappears. See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954); *Kane* v. *National Institute of*

Agrarian Reform, No. 61 L. 730, Fla. Cir. Ct., 11th Dist., 1961.[4]

Accordingly, there remains only the question whether the Court of Appeals was correct in finding, on the basis of the particular materials before it, that the Executive Branch was in fact willing that *in this case* the courts should undertake to examine the validity of the confiscatory Cuban decree. This question, the answer to which depends upon the interpretation of those materials, is plainly one of narrow scope. Petitioner's suggestion that the decision of the court below conflicts with that of the Court of Appeals for the Fourth Circuit in *Rich* v. *Naviera Vacuba, S.A.* (*The Bahia de Nipe*), 295 F.2d 24 (1961) is hardly tenable. The court there had before it an expression of views from the Executive Branch stated altogether differently from those involved here. It seems hardly necessary to point out that in an area where the views of the Executive Branch are admittedly significant, two decisions cannot persuasively be said to be in conflict when different expressions by the Executive, applicable to distinctly different fact situations, are involved and each court makes a finding as to the Executive policy with respect to the litigation before it on the basis of the particular expression applicable to that litigation.[5]

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[4] Petitioner appears to urge that American Banana Co. v. United Fruit Co., 213 U.S. 347, prevents American courts from examining the legality of the acts of a foreign sovereign for reasons altogether apart from the possibility of interference with the conduct of foreign relations by the Executive Branch. It is clear, however, that the language from the Banana case quoted by petitioner relates only to the status of the act of a sovereign under its own law.

[5] The circumstances which prompted the expression of Executive policy in the Rich case have no counterpart in the present litigation. The property involved in that litigation had reached the jurisdic-

The circumstances of the *Rich* case are indeed significant here, but for a reason precisely the opposite of that urged by petitioner. That case demonstrates that when the Executive Branch has in fact wished the courts to eschew consideration of the validity of the acts of the Cuban Government, it has not hesitated to say so in language that petitioner itself has characterized as "clear" and "unambiguous." Were the State Department in fact desirous in taking as to this litigation the position which petitioner so incongruously urges in its behalf, it may confidently be assumed that it would have said so long since.

III.

Petitioner argues that the fact that the Court of Appeals, in seeking to ascertain the attitude of the Executive Branch toward judicial consideration of the violation of international law so plainly involved in this case, relied in part on letters from the State Department to counsel for *amici curiae* deprived petitioner of due process of law. No cases are cited in support of this proposition. In fact, it is normal practice in cases of this nature for the position of the Executive to be communicated to the courts by way of communications to litigants. See, *e.g.*, *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954); *Kane* v. *National Institute of Agrarian Reform*, No. 61 L. 730, Fla. Cir. Ct., 11th Dist. 1961. Petitioner was on notice that *amici* had filed

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tion of the United States only because it had been "hijacked" on the high seas, and the Executive was at the time faced with the problem of other hijackings which had brought United States property within the territorial jurisdiction of Cuba. Moreover, the legal doctrine primarily involved in Rich—that of sovereign immunity—plays no part in the present litigation.

with the Court of Appeals the correspondence received from the State Department; copies of the correspondence were delivered to petitioner at the same time. Petitioner did not object at any time while this case was pending before the Court of Appeals to that court's consideration of the correspondence. Even now, it does not attempt to indicate how it would have been better off had the views of the Executive Branch been presented in a different manner.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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October 4, 1962